Supreme Court, U.S.
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In The

Supreme Court of the United States

ROGER LEE SANDERS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Texas rule of *Hernandez v. State* allowing the taking of judicial notice of the reliability of expert or scientific methodology in a criminal case violate a criminal defendant's rights to equal protection or due process?

A. Why should the State of Texas be allowed a lower burden for the admission of expert testimony in a criminal proceeding than a similarly situated proponent in a civil proceeding when the prosecution in a criminal proceeding must carry a substantially higher burden of proof than the civil litigant to prevail?

B. Why should a litigant be deprived of his right to notice of and to challenge the taking of judicial notice?

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RELATED PROCEEDINGS

none

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PETITION FOR WRIT OF CERTIORARI

Petitioner Roger Lee Sanders respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals filed August 30, 2006.

OPINIONS BELOW

The judgment of the trial court is unpublished but is reproduced in the appendix. The opinion of the Court of Appeals is published at *Sanders v. State*, 191 S.W.3d 272 (Tex. App. – Waco 2006, pet. ref'd), and a copy of the opinion is reproduced in the appendix. The Court of Criminal Appeals refusal of discretionary review is without opinion but noted at *In re Sanders*, 2006 Tex. Crim. App. LEXIS 1527 (Tex. Crim. App., No. PD-0424-06, August 30, 2006). A copy of the notification of refusal is reproduced in the appendix.

JURISDICTION

The judgment and opinion of the Texas Court of Criminal Appeals were filed on August 30, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

The Criminal District Court No. 3 of Tarrant County, Texas had jurisdiction pursuant to Tex. Code Crim. Proc. art. 4.01. The Tenth Court of Appeals at Waco, Texas had jurisdiction pursuant to Tex. Code Crim. Proc. art. 4.03 and a Courts of Appeals docket equalization order issued

by the Texas Supreme Court.[1] The Texas Court of Criminal Appeals had jurisdiction to grant discretionary review of this case pursuant to Tex. Code Crim. Proc. art. 4.02, and discretionary review by the Texas Court of Criminal Appeals was sought pursuant to Tex. Code Crim. Proc. art. 44.45(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition for writ of certiorari implicates both the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

[1] Appeals from the courts of Tarrant County, Texas courts are heard by the Second Court of Appeals at Fort Worth. However, as the workload of the fourteen Texas Courts of Appeals is substantially unevenly distributed given the geographic districts assigned each court, the Texas Supreme Court periodically redistributes cases from the Dallas, Fort Worth and both Houston courts of appeals to courts with lesser workloads to insure the timely review of the appeals. Thus, this appeal was transferred by Texas Supreme Court order to the Tenth Court of Appeals at Waco.

> property be taken for public use, without just compensation.

U.S. Const. Amend. V.

The Fourteenth Amendment provides in relevant part as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, sec. 1.

This petition for writ of certiorari also implicates Texas Rule of Evidence 702. This rule provides as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Tex. R. Ev. 702.[2]

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[2] Texas Rule of Evidence 702 is identical to the first half of Federal Rule of Evidence 702. Fed. R. Ev. 702 is different only in that it appends a dependant clause with the following language that the Texas rule does not contain: "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Ev. 702.

This petition for writ of certiorari also implicates Texas Rule of Evidence 201. This rule provides as follows:

> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When Discretionary. A court may take judicial notice, whether requested or not.
>
> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.
>
> (g) Instructing Jury. In civil cases, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In criminal cases, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Tex. R. Ev. 201.

STATEMENT OF THE CASE

A. Proceedings Below

On May 16, 2003, a grand jury returned an indictment against Mr. Sanders charging him with five counts of aggravated sexual assault. Subsequently, a new indictment expanded the allegations in the original indictment to ten counts of aggravated sexual assault. After trial, the jury returned guilty verdicts on all ten counts on December 6, 2004. On December 7, 2004 the jury assessed punishment at confinement for life on all ten counts. Notice of appeal and the trial court's certification of right to appeal were timely. This appeal was transferred from the Second Court of Appeals to the Tenth Court of Appeals pursuant to a docket equalization order on January 13, 2005. The Tenth Court of Appeals, in a published opinion, affirmed Mr. Sanders' conviction and sentence on all counts on March 8, 2006. On June 6, 2006, Mr. Sanders timely filed a petition for discretionary review, which was refused on August 30, 2006. Review in this court is now sought.

B. Statement of Relevant Facts

As Mr. Sanders' petition for writ of certiorari focuses only on the introduction of expert witness testimony and the related error, the relevant facts will be limited to this. In this aggravated sexual assault of a minor prosecution, the admission of the State of Texas' expert forensic computer examiner was critical because the expert used several software tools to recover alleged child pornography images from Mr. Sanders' personal computer. The State of Texas felt these images important to her case and attempted to introduce them at the guilt/innocence phase of

the trial. They were excluded at the guilt/innocence phase on relevance and Tex. R. Ev. 403 grounds but were admitted in the punishment phase. After viewing these images, the jury assessed a life sentence for each of the ten counts of conviction.

At the pretrial hearing, the state indicated that it would most likely not call an expert witness but if one were it would be a sexual exam nurse. ("The State's not anticipating calling any expert. The only thing that could possibly [be] construed as an expert would be the sexual assault exam nurse. . . ."). But during trial, the state sought to introduce the testimony of Jessie J. Lee, a computer forensic investigator, who recovered the alleged child pornography from computer media found in Mr. Sanders' apartment that was introduced in the punishment phase of the trial.[3] Mr. Lee had about 600 hours of training in his field, had attended some schools on the software programs he used, had been in his current position only about four years, and though certified as a computer forensics examiner at the time of trial was not so certified at the time he did this work. Mr. Lee examined the computer media[4] seized from Mr. Sanders' apartment pursuant to a search warrant, and using computer software programs he searched and recovered the alleged child pornography images from the computer media. The trial court held a hearing outside the presence of the jury to determine the admissibility of this testimony. At the

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[3] Mr. Lee did not testify in the guilt/innocence phase as the trial court had excluded on relevance and Rule 403 grounds the pictures that he had recovered; therefore, there was nothing for him to testify to.

[4] In total, there were 2 ZIP disks, 119 CD-ROMs, and 237 floppy disks seized from Mr. Sanders' apartment.

conclusion of this hearing, the trial court did not rule on the admissibility of the expert testimony but rather excluded the alleged child pornography under Tex. R. Ev. 403. Subsequently and prior to the beginning of the punishment phase, the trial court elected to rule on the 702 challenge to Mr. Lee and "f[ound] that under Rule 702 and 703 that Mr. Jessie Lee is qualified to testify as an expert, and that testimony will be admissible."

Mr. Lee used two computer programs, EnCase and Forensic Toolkit, to scan and copy these media. He searched the media for potential child pornography images and made copies of the ones believed to contain child pornography. ("The first thing I did was get the floppies and preview them using our forensic software, using EnCase; and if there was images [sic] on there I believed to be child pornography, then I separated those disks from the others.") EnCase apparently searches the disks. ("EnCase goes through and and [sic] it recovers or identifies files by footers and headers, and that's how it's indexed, by file type.") When suspected materials are found, those disks are copied. ("And then once I had gone through all of them, I made an image of the ones that had I believe child pornography.") Then, the copies are verified against the originals by the use of "an MD5 hash," which is a 128-bit algorithm. Apparently, the hash of the original and the copy must match to confirm that a valid copy has been made. ("The software validates the copy by running a hash against the drive and the image, and if the hashes mesh, that means that you have a correct copy of the original media."). Recovery of deleted files was done by searching something called the file allocation table, which is something of a table of contents for a given media that would

show if a file had previously existed on the disk by changes to its listing in the file allocation table.

Other than this, little explanation was provided except for the following. Mr. Lee testified regarding the error rate of the procedure. ("Q. So what are the chances that if the hash value matches, that you've missed something or something is incorrect? A. Well, it would have to be greater than 128 bit, you know, but basically there's no chance. If the hash values match, then you have a correct image.") This software and procedure is apparently accepted within the relevant scientific community. ("Q. And would you call [this] sort of the field standard for examining? A. Yes.") Papers regarding this software are published on the manufacturer's website. ("Q. Are there white papers and other treatises published about EnCase and how it works? A. Yes, there is. . . . Q. [T]hose treatises, have they been published anywhere? A. Yes. They're in the EnCase website or Guidance Software website.")

It is the admission of this testimony and the Court of Appeals' subsequent disposition of this on appeal about which Mr. Sanders complains. To the Court of Appeals, Mr. Sanders complained that the trial court erred by admitting the recovered images because the forensic computer examiner was not qualified and his methodology unreliable. The Court of Appeals rejected the argument about the reliability of the methodology by relying on the relatively new rule of *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003). *Hernandez* held that courts may take judicial notice of the reliability of the scientific methodology in question if it has been thoroughly vetted and found reliable by other courts. On petition for discretionary

review to the Texas Court of Criminal Appeals, Mr. Sanders contended that this taking of judicial notice violated his due process and equal protection rights. The Texas Court of Criminal Appeals declined to hear these issues, and Mr. Sanders now presents them to this Court.

REASONS FOR GRANTING THE PETITION

I. The Texas rule of *Hernandez v. State* allowing the taking of judicial notice of the reliability of expert or scientific methodology in a criminal case violates a criminal defendant's rights to equal protection and due process.

The current Texas rule allowing the taking of judicial notice of the reliability of expert or scientific methodology in a criminal case violates a criminal defendant's rights to equal protection and due process. This is so in two ways. First, this contravenes the equal protection guarantees of the Fourteenth Amendment. The State, notwithstanding its higher burden of proof, need do little, if anything, to demonstrate the reliability of its scientific or expert evidence, while the similarly situated civil plaintiff, who need prove its case only by a preponderance of the evidence, must still meet its burden to demonstrate reliability. Second, when this is done for the first time on appeal, it contravenes the due process protections of the Fifth Amendment as extended to state proceedings. More specifically, the taking of judicial notice on appeal deprives the litigant of notice of the intent to take judicial notice and the opportunity to challenge this as provided for in Tex. R. Ev. 201.

The Texas and federal rules for determining the reliability of expert testimony are virtually identical. Texas adopted the following rule:

> [E]vidence derived from a scientific theory, to be considered reliable, must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question. Under Rule 104(a) and (c) and Rule 702, all three criteria must be proven to the trial court, outside the presence of the jury, before the evidence may be admitted. Factors that could affect a trial court's determination of reliability include, but are not limited to, the following: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the experts testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.

Kelly v. State, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). This is virtually identical to the federal standard. *See* Fed. R. Ev. 702; *see generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[5] Both the Texas and

[5] In a curious twist, *Kelly* predated *Daubert* by a year.

federal rules place the burden on the proponent of the testimony. *See Kelly*, 824 S.W.2d at 573; *Daubert*, 509 U.S. at 589-80. The Texas Court of Criminal Appeals, however, has recently abrogated this demonstration of reliability requirement in certain cases.

The Texas Court of Criminal Appeals has held that judicial notice may be taken of the reliability of more common scientific methods. Once a methodology has been thoroughly vetted in the trial courts, the proponent need not prove its reliability and the trial court may simply judicially notice its reliability:[6]

> A party seeking to introduce evidence of a scientific principle need not always present expert testimony, treatises, or other scientific material to satisfy the *Kelly* test. It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly*. Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Daubert/Kelly* hearings, subsequent courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon

[6] Facially, this does not seem a bad idea. It would streamline the presentation of evidence, shorten proceedings, and eliminate many marginal challenges to experts. Particularly, this is so in the criminal context. The younger, less-experienced prosecutors handling misdemeanor and lesser felony charges would need not worry about meeting the burdens of Tex. R. Ev. 702 and could try more cases and convict more people. That, however, highlights the problems with this that will be discussed in more detail below – at what constitutional price does this efficiency come?

> the process, materials, and evidence produced in those prior hearings.
>
> Similarly, once some courts have, through a *Daubert/Kelly* "gatekeeping" hearing, determined the scientific reliability and validity of a specific methodology to implement or test the particular scientific theory, other courts may take judicial notice of the reliability (or unreliability) of that particular methodology.
>
> Trial courts are not required to re-invent the scientific wheel in every trial. However, some trial court must actually examine and assess the reliability of the particular scientific wheel before other courts may ride along behind. Some court, somewhere, has to conduct an adversarial gatekeeping hearing to determine the reliability of the given scientific theory and its methodology.

Hernandez v. State, 116 S.W.3d 26, 28-29 (Tex. Crim. App. 2003).[7]

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[7] In a concurring opinion, the presiding judge of the Court offered more guidance on the taking of judicial notice:

> The reliability of a scientific theory or technique should be judicially noticed under the following circumstances: (1) when it is a matter of common knowledge, (2) when widely available court decisions show that reliability has been litigated elsewhere in fact-finding forums to a degree sufficient for the appellate court to conclude that reliability is well-established, and (3) when a prior determination of reliability has been made by an appellate court whose pronouncements are binding in the jurisdiction.

Hernandez, 116 S.W.3d at 32 (Keller, P.J., concurring).

This is curious guidance for two reasons. On the one hand, it seems to raise the burden in the majority opinion – i.e., not only must the method have been thoroughly vetted in the trial courts, it must also have been accepted by a controlling appellate court. On the other hand,

(Continued on following page)

This new rule has been seized upon with great fervor by Texas courts to affirm the admission of scientific and expert evidence. *See Russeau v. State*, 171 S.W.3d 871, 883 (Tex. Crim. App. 2005); *Cooper v. State*, 2006 Tex. App. LEXIS 942, *7 (Tex. App. – El Paso 2005, no pet.) (not designated for publication); *Salazar v. State*, 2005 Tex. App. LEXIS 7187, *8 (Tex. App. – Austin 2005, pet. ref'd) (not designated for publication); *Harris v. State*, 2005 Tex. App. LEXIS 7227, *8-9 (Tex. App. – Fort Worth 2005, no pet.) (not designated for publication); *Hurtado v. State*, 2005 Tex. App. LEXIS 5270, *3-7 (Tex. App. – Austin 2005, no pet.) (not designated for publication); *Oropeza v. State*, 2004 Tex. App. LEXIS 2588, *3 (Tex. App. – Dallas 2004, pet. ref'd) (not designated for publication); *Holmes v. State*, 135 S.W.3d 178, 185 (Tex. App. – Waco 2004, no pet.).[8]

Further, this new rule has been extended to eliminate any need for the proponent of expert or scientific testimony to bring forth evidence showing its reliability. Rather, the trial court may do this for them:

> There is no "bright line" judicial rule for when a scientific theory or technique becomes so widely accepted or persuasively proven that future courts may take judicial notice of its reliability. However, if the Court of Criminal Appeals,

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it diminishes the significance of scientific or expert testimony – i.e., it would require that the matter be common knowledge. This is curious because something that is common knowledge would, *ipso facto*, not require an expert to be comprehended much less known. Thus, though this "common knowledge" requirement fits nicely with the Tex. R. Ev. 201(b)'s requirements for the taking of judicial notice, it wholly misses the point of Tex. R. Ev. 702.

[8] The sheer number and percentage of unpublished opinions is telling.

> this Court, or another Texas appellate court has already determined the validity of a particular scientific theory or technique, *then the party offering the expert testimony need not satisfy* Kelly's *first two criteria*. The trial court and a reviewing court can rely upon prior opinions and take judicial notice of those findings.

Holmes v. State, 135 S.W.3d 178, 185-86 (Tex. App. – Waco 2004, no pet.) (internal citations omitted) (emphasis added); *see also Russeau v. State*, 171 S.W.3d 871, 882 n.4 (Tex. Crim. App. 2005) ("Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Kelly* hearings, subsequent courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings.").

In the present case, Mr. Sanders challenged on appeal the propriety of the admission of the forensic computer examiner's testimony contending that the State had not demonstrated the reliability of the EnCase software and, thus, the trial court erred by admitting it. In affirming, the Tenth Court of Appeals relied, at least in part, on prior judicial determinations of the reliability of the EnCase software. *Sanders*, 191 S.W.3d at 278 n.4 (citing *Williford v. State*, 127 S.W.3d 309, 312-13 (Tex. App. – Eastland 2004, pet. ref'd); *Hernandez v. State*, 116 S.W.3d 26, 28-29 (Tex. Crim. App. 2003)). However, this is the first time in this proceeding that judicial notice of the reliability had occurred. On petition for discretionary review to the Texas Court of Criminal Appeals, that court declined to consider the questions now presented to this Court.

A. Judicially noticing the reliability of the State's expert witness' methodology violates the equal protection clause by allowing the State of Texas to introduce expert testimony against a criminal defendant by meeting a lower threshold than a similarly situated civil litigant notwithstanding the higher burden of proof in the criminal case.

Mr. Sanders contends that the taking of judicial notice of the reliability of scientific or expert evidence violates the equal protection clause of the United States Constitution because it treats him significantly harsher than a comparably situated civil litigant. More specifically, *Hernandez* and its progeny allow the taking of judicial notice of the reliability of expert or scientific evidence offered by the State against a criminal defendant without the proponent's offering evidence to demonstrate this. No such comparable avenue, however, exists for civil litigants in either the Texas state courts or the U.S. District Courts within the Fifth Circuit. Thus, the State in a criminal case, though it must prove its case against a defendant beyond a reasonable doubt, need do little, if anything, to admit its scientific or expert evidence while a civil plaintiff who must prove its case by a mere preponderance of the evidence must demonstrate the reliability of its expert or scientific evidence in the usual manner.

A civil litigant in Texas who proposes to admit expert testimony does not enjoy the benefits of *Hernandez* and must still meet all three Rule 702 hurdles. The Texas Supreme Court recently took a dim view of the taking of judicial notice of expert testimony. In *In the interest of J.L.*, 163 S.W.3d 79 (Tex. 2005), a termination of parental rights case, that Court addressed the Court of Appeals'

taking judicial notice of expert testimony regarding the nature of injuries sustained by J.L.'s sister and found it beyond the scope of Tex. R. Ev. 201 and wholly inappropriate as the testimony squarely addressed disputed matters within the case:

> Even assuming that this statement from [*Sparkman*] may be read to create the opportunity for judicial notice of new evidence to avoid an unjust judgment, it would not apply to the expert testimony at issue here. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." If a fact is generally known, then obviously no expert is needed. Moreover, expert testimony invariably concerns matters in dispute which are not capable of accurate resolution from outside, unquestioned sources. *Because Dr. Wilson's testimony concerned disputed facts and opinions, it should not have been judicially noticed.*

In the interest of J.L., 163 S.W.3d at 84 (Tex. 2005) (quoting Tex. R. Ev. 201(b)) (emphasis added). Indeed, the furthest the Texas Supreme Court has gone with respect to judicial notice of expert or scientific evidence is recognizing that judicial notice "under appropriate circumstances" might be a legitimate basis for evaluating an expert's reasonable reliance under Tex. R. Ev. 703. *E.I. du Pont De Nemours and Company v. Robinson*, 923 S.W.2d 549, 567 (Tex. 1995) (citing Tex. R. Ev. 803 (18)) (Cornyn, J., dissenting). Thus, the Texas civil litigant must still meet all three Rule 702 hurdles to have its expert testimony admitted.

The United States Court of Appeals for the Fifth Circuit takes an equally harsh approach to the judicial noticing of such matters. In *Wooden v. Missouri-Pacific RR Co.*, 862 F.2d 560, 563 (5th Cir. 1989), that Court addressed whether the district court "should have taken judicial notice that it was common knowledge in the late 1950's that working in a cloud of silicon dust without respiratory gear could cause severe lung diseases." The Fifth Circuit answered that question in the negative. In so doing, it first noted that Fed. R. Ev. 201 limits the taking of judicial notice to a matter "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Wooden*, 862 F.2d at 563 (quoting Fed. R. Ev. 201) (internal quotation omitted). Then it applied the test for taking judicial notice from *Hardy v. Johns-Mansville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982) and concluded as follows:

> In *Hardy*, this court reversed a district court ruling taking judicial notice of the fact that exposure to asbestosis fiber causes cancer. As we said in that case, "judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities. The proposition that asbestos causes cancer, because it is inextricably linked to a host of disputed issues . . . is not at present so self-evident a proposition as to be subject to judicial notice."
>
> *The essential defect in Wooden's argument is that the fact he asks be noticed is closely joined to an obviously, and legitimately, controverted issue*: even if it was common knowledge in 1955 that

> inhaling silica dusts could lead to lung disease, that does not resolve the crucial question of whether the Railroad should have known that the particular concentration of dust to which Wooden was exposed entailed a significant risk of silicosis. *To notice the fact that some concentrations of silica dusts were known to be harmful would only confuse the jury's consideration of whether the Railroad did know, or should have known, a particular concentration to be harmful.*

Wooden, 862 F.2d at 563 (quoting *Hardy v. Johns-Mansville Sales Corp.*, 681 F.2d 334, 347-48 (5th Cir. 1982); other citations omitted) (emphasis added). Thus, it appears that the civil litigants in the U.S. District Courts in the Fifth Circuit must also meet all three of Rule 702's hurdles to have their expert testimony admitted.

In sum, Mr. Sanders asks this Court to grant this petition and issue a writ of certiorari to consider whether the taking of judicial notice of the reliability of scientific or expert evidence violates the equal protection clause of the United States Constitution because it treats him significantly harsher than a comparably situated civil litigant. Under the present rule, the State, which has the burden of proof beyond a reasonable doubt, need do little, if anything, to demonstrate the reliability of its scientific or expert evidence while the similarly situated civil plaintiff, who must prove its case by a mere preponderance of the evidence, must still demonstrate the reliability of its scientific or expert evidence. Therefore, this Court should consider this important issue.

B. The taking of judicial notice on appeal offends the due process clause by dispensing with the notice and right to challenge provisions of Tex. R. Ev. 201.

Mr. Sanders contends that the taking of judicial notice of the reliability of scientific or expert evidence by an appellate court violates the due process clauses of the United States Constitution because it deprives him of the rights to notice and to be heard in opposition.[9] When an appellate court takes judicial notice of the reliability of scientific or expert evidence to affirm a trial court's admission of that evidence, the appellate court follows a sure path to an expeditious affirmation of the trial court's decision but does so at the expense of the defendant's rights as it deprives the defendant of his express rights to notice of the taking of judicial notice and to be heard in opposition to it. Moreover, this extends judicial notice far beyond its intended purpose by not only relieving the proponent of any burden of proof but also depriving the defendant of any ability to contest the taking of judicial notice.

The taking of judicial notice of the reliability of the EnCase forensic software was not before the trial court. However, as discussed above, the Tenth Court apparently resolved Mr. Sanders' challenge to the admission of this testimony, at least in part, by noting that the EnCase forensic software had previously been found to be reliable

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[9] Though not applicable in this case, the rule of *Holmes v. State* and *Russeau v. State* removing any requirement that the proponent present any evidence of the reliability of the methodology seems to approach depriving the defendant of an ability to confront the witnesses against him. Certainly, that is but one more step away.

by *Williford* and by noting that *Hernandez* authorized the taking of judicial notice of the reliability of a scientific method. *Sanders*, 191 S.W.3d at 278 n.4. This deprived Mr. Sanders of his right to notice of the taking of judicial notice of this reliability and to be heard in opposition to it as provided by Tex. R. Ev. 201. He contends that this is error depriving him of his rights to due process of law as provided by U.S. Const. Amend XIV, sec. 1.

This Court has previously rejected the after-the-fact taking of judicial notice. In 1937, in *Ohio Bell Tel. Co. v. Public Utils. Comm.*, 301 U.S. 292, 294 (1937), Ohio Bell sought to obtain authorization for a rate increase after it merged with another company. After numerous hearings and the introduction of substantial evidence regarding the valuation of its assets,[10] the Public Utilities Commission arbitrarily adjusted the valuations of those assets based on information about property valuation trends that was not presented to it in any hearing, *id.* at 296-97, and that it refused to reveal, *id.*, and ordered Ohio Bell to make substantial refunds to its customers:

> Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze

[10] Utility rates are ultimately determined by the return on assets the utility company is entitled to earn. *See Ohio Bell Tel. Co.*, 301 U.S. at 298. Hence, the focus on the valuation of Ohio Bell's assets.

> them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs.

Id. at 300. When this was challenged, the Commission – and later the state court – attempted to justify this adjustment based on materials and information outside the scope of the hearings as the taking of judicial notice of these facts.

This Court summarily rejected this application of judicial notice:

> An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. Indeed, decisions of this court were cited . . . as giving support to the new doctrine that the values of land and labor and buildings and equipment, with all their yearly fluctuations, no longer call for evidence. Our opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states, but not of the extent of the depreciation at a given time and place. The distinction is the more important in

> cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. *Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.* Such at least is the general rule, to be adhered to in the absence of exceptional conditions. Here the contention would be futile that the precise amount of the decline in values was so determinate or notorious in each and every year between 1925 and 1933 as to be beyond the range of question. So much is indeed conceded on the face of the report itself. No rational concept of notoriety will include these variable elements. True, the category is not a closed one. The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact is notorious to the community. *Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial.*

Ohio Bell Tel. Co., 301 U.S. at 301-03 (emphasis added) (internal citations and quotations omitted).

The Texas Supreme Court has also noted that an appellate court should rarely take judicial notice of matters when the trial court was not requested to do so. In *Sparkman v. Maxwell*, 519 S.W.2d 852, 855 (Tex. 1975), an automobile accident case, the Texas Supreme Court was asked to take judicial notice of the 1967 Texas Manual on Uniform Traffic Control Devices while the case was

pending before it. At trial, the parties had introduced various portions of its contents, but the entire manual had not been introduced. *Id.* The Texas Supreme Court declined this invitation noting, amongst other things, that "an appellate court is naturally reluctant to take judicial notice of matters such as municipal charters and regulations promulgated by state agencies *when the trial court was not requested to do so and was not given an opportunity to examine the necessary source material.*" *Id.* (citing 1 McCormick and Ray, *Texas Law of Evidence* §§ 152, 155 (2nd ed. 1956)) (emphasis added). The obvious corollary to this is that had this occurred in the trial court, the opponent would have known about it and had the opportunity to have been heard on it. Tex. R. Ev. 201(e). The Fifth Circuit agrees and has suggested that prior notice and opportunity to be heard are key components of the taking of judicial notice.

In *United States v. Courtney*, 979 F.2d 45, 50 (5th Cir. 1992) (citing Fed. R. Crim. P. 32.1(a)(2) & Fed. R. Ev. 201) (emphasis added) that Court suggested that if the threshold levels for drug test results caused by passive inhalation were to be established through judicial notice that that would have to be "based on an adequately developed foundation *and prior notice and opportunity to rebut.*" Likewise in *United States v. Judge*, 846 F.2d 274, 276-77 (5th Cir. 1988), the Fifth Circuit stated that "the selective reprinting [on appeal of the materials sought to be judicially noticed] does not give appellant an adequate opportunity to challenge the [materials.]"

Other courts and commentators have argued that the other party should have notice and an opportunity to rebut matters to be judicial noticed. Consider the following:

> An elementary sense of fairness might indicate that a judge before making a final ruling that judicial notice will be taken should notify the parties of his intention to do so *and afford them an opportunity to present information which might bear upon the propriety of noticing the fact*, or upon the truth of the matter to be noticed.

McCormick on Evidence, § 333, at 934 (Edward W. Cleary, ed., 3rd ed. 1984) (emphasis added); *see also* 1 Weinstein & Berger, *Weinstein's Evidence*, ¶ 201[05], at 201-51 – 201-52 (1995) (noting that a court should notify litigants before taking judicial notice). The Connecticut Supreme Court has suggested that "[s]*o long as the parties are offered an opportunity to be heard*[,] the court may notice any fact concerning the parties and events of the case that is appropriate for judicial notice." *State v. Zayas*, 490 A.2d 68, 71 (Conn. 1985) (emphasis added).

Indeed, a judge of the Texas Court of Criminal Appeals has also recognized the problem. Judge Clinton writing in *Emerson v. State*, 880 S.W.2d 759, 770-71 (Tex. Crim. App. 1994) (Clinton, J., dissenting) succinctly summarized the problems with taking judicial notice:

> Today the majority takes judicial notice that evidence of the results of the horizontal gaze nystagmus (HGN) test meets the criteria of *Kelly*[] governing admissibility of scientific or specialized evidence under Tex.R.Cr.Evid., Rule 702, and is thus admissible in a prosecution for driving while intoxicated. From what the majority says it may well be that, when the time comes, we should hold that HGN evidence is admissible. By reaching that question in this case, however, for the first time on petition for discretionary review, the majority has relieved the State, as

proponent of the HGN evidence, of its ordinary burden of establishing at trial that evidence it has proffered is relevant in the first instance, under Tex. R. Cr[im]. Evid., Rules 401 and 402. I therefore dissent.

. . . .

I agree, then, that the issue whether Trevino's testimony was admissible as expert opinion is properly before us. But I vehemently disagree that we may take judicial notice for the first time on discretionary review of predicate matters that *Kelly* requires to be established in the trial court before certain kinds of expert testimony may be admissible. In *Kelly* itself we summarized our holding to be that "under Rule 702 the proponent of novel scientific evidence must prove to the trial court, by clear and convincing evidence and outside the presence of the jury, that the proffered evidence is admissible." Today, it is a majority of this Court that holds for the first time in this cause that the predicate theory that intoxication affects HGN in certain ways is sufficiently well documented that the results of an HGN test can come in under Rule 702. With all due respect, when it comes to novel scientific evidence, unless the predicate theory has been established in the trial court, the trial judge has no basis to conclude the evidence is even relevant, under Rules 401 and 402, much less that it "will assist" the jury under Rule 702. Under these circumstances he errs to admit the evidence over valid objection.

By taking judicial notice of the predicate theory for the first time on discretionary review, the Court relieves the proponent (here, as in *Kelly*, the State) of what the Court admits is

> novel scientific evidence of its ordinary burden to establish the relevance, and hence admissibility, of that evidence under Rules 401 and 402, and, perforce, Rule 702. In thus relieving the State of an ordinary burden, the Court abandons impartiality and interferes unduly with the adversarial trial process. *In short, the Court deprives appellant, at the appellate level, of due process and due course of law!*

Emerson, 880 S.W.2d at 770-71 (Clinton, J., dissenting) (emphasis (except exclamation point) added).

In sum, Mr. Sanders asks this Court to grant this petition and issue a writ of certiorari to consider whether an appellate court's taking of judicial notice of the reliability of scientific or expert testimony when that was not before the trial court violates his right to due process of law by depriving him of his specifically articulated rights to notice of the taking of judicial notice and to be heard in opposition to it. Given the express rejection of such action by both this Court and the Texas Supreme Court, the implicit suggestion by the Fifth Circuit that such a procedure would be improper, and the expression of such sentiment by judges and commentators, it would seem that the Texas criminal rule is out of step and needs correction. Therefore, this Court should consider this important issue.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Texas courts in this case.

DATED: November 28, 2006.

Respectfully submitted,

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ROGER LEE SANDERS, Appellant
v.
THE STATE OF TEXAS, Appellee

No. 10-05-00030-CR

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

191 S.W.3d 272; 2006 Tex. App. LEXIS 1872

March 8, 2006, Opinion Delivered
March 8, 2006, Opinion Filed

COUNSEL: For APPELLANT/RELATOR: Leigh W. Davis, ATTORNEY at LAW, Ft. Worth, TX.

For APPELLEE/RESPONDENT: Tim Curry, TARRANT COUNTY CRIM. DISTRICT ATTORNEY, Ft. Worth, TX.

JUDGES: Before Chief Justice Gray, Justice Vance, and Justice Reyna.

OPINION BY: BILL VANCE

OPINION:

Appellant Roger Sanders was sentenced to life in prison after his conviction on ten counts of aggravated sexual assault of a child under the age of fourteen. Sanders appeals, asserting four issues. We will affirm.

Background

C., Sanders's former stepdaughter, testified that Sanders began sexually abusing her in the fall of 1999, when C. was eleven. Sometimes during the abuse, Sanders made C. look at child pornography on his computer or at pornographic movies. The abuse continued until 2002, when the marriage between C.'s mother and Sanders

ended in separation and divorce. After C. reported the abuse, police obtained and executed a search warrant at Sanders's apartment, seizing a computer and various disks containing a large amount of child pornography.

Jury Argument

In his first issue, Sanders complains of the State's rebuttal jury argument during guilt-innocence. The prosecutor first argued: "If you want to find [Sanders] not guilty, you need to be prepared to tell that girl to her face you believe her to be a liar." Sanders objected to that argument as outside the record, and the trial court sustained the objection and instructed the jury to disregard it.

The prosecutor then argued, over Sanders's objections that it was outside the record and outside the scope of the law, the following:

> If you find this gentleman not guilty, then you are saying that [C.] is a liar, and that is not the case.
>
> Not guilty would mean that [C.] has lied to you, and that is not what the evidence shows in this case.

The trial court overruled the objections, and after the jury retired, Sanders's motion for mistrial was denied. On appeal, Sanders asserts that the jury argument was improper, complaining that the argument was designed to inflame the jury and to bolster the victim's credibility.

Jury argument is limited to: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answers to argument of opposing counsel; or (4) a plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex.

Crim. App. 1999); *Sandoval v. State*, 52 S.W.3d 851, 857 (Tex. App. – Houston [1st Dist.] 2001, pet. ref'd). To determine whether a party's argument properly falls within one of these categories, we must consider the argument in light of the entire record. *Sandoval*, 52 S.W.3d at 857.

It is improper for a prosecutor to bolster the victim's testimony by injecting the prosecutor's personal opinion about the victim's honesty and truthfulness. *Flores v. State*, 778 S.W.2d 526, 528 (Tex. App. – Corpus Christi 1989, no pet.) (citing *Menefee v. State*, 614 S.W.2d 167, 168 (Tex. Crim. App. 1981) ("I don't believe I have ever seen anybody that I thought was any more honest than she is" held to be improper argument), *citing Puckett v. State*, 168 Tex. Crim. 615, 330 S.W.2d 465 (Tex. Crim. App. 1959) ("I'm telling you that they are telling the truth" held to be improper argument, requiring reversal)). But the arguments at issue were not bolstering the victim's credibility; they were a reasonable deduction from the evidence on the credibility issues in the case. *See Loar v. State*, 627 S.W.2d 399, 401 (Tex. Crim. App. [Panel Op.] 1981) (upholding propriety of "And if you want to acquit, then you have to believe that the three police officers got together and lied about everything."). Additionally, the prosecutor's arguments were in response to defense counsel's arguments attacking C.'s credibility, which was one of the main themes of the defense argument. As a response to the defense argument, the prosecutor's rebuttal was proper. *E.g., Wylie v. State*, 908 S.W.2d 307, 310 (Tex. App. – San Antonio 1995, pet. ref'd); *see also Lange v. State*, 57 S.W.3d 458, 467-69 (Tex. App. – Amarillo 2001, pet. ref'd). We overrule the first issue.

Extraneous-Offense Evidence

Sanders's second issue complains of the admission of extraneous-offense evidence (alleged child pornography), claiming: (1) the State did not timely inform Sanders of its intent to use evidence that he possessed child pornography; (2) the trial court erred in denying his motion for continuance to examine the evidence; and (3) the trial court erred by admitting the photographs at the punishment stage after finding them inadmissible during guilt-innocence.

The State gave notice of its intent to offer extraneous-offense evidence on November 19, 2004, about eleven days before jury selection began. The State filed an amended notice on November 23, about two weeks before the punishment phase (when the evidence at issue was actually admitted). Sanders had filed a motion for discovery that included a request that the trial court order the State to give reasonable pretrial notice of its intent to offer extraneous-offense evidence, but the trial court did not rule on this request.

We review the trial court's admission of extraneous-offense evidence for abuse of discretion. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). On the defendant's timely request to the attorney for the State, notice of intent to introduce extraneous-offense evidence must be given by State in the same manner required by Rule of Evidence 404(b). TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2005). A defendant's motion requesting the court to order the State to provide notice of intent to present extraneous-offense evidence is insufficient to trigger the notice requirement of article 37.07. *Mitchell v. State*, 982 S.W.2d 425, 427 (Tex. Crim. App.

1998); *see also Simpson v. State*, 991 S.W.2d 798, 801 (Tex. Crim. App. 1998) (holding defendant's motion requesting the court to order the State to provide notice of intent to offer extraneous-offense evidence insufficient to trigger notice requirement); *Espinosa v. State*, 853 S.W.2d 36, 39 (Tex. Crim. App. 1993) ("when a defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule."). Because Sanders neither made a request for notice nor secured a ruling on his motion for an order to the State to provide notice, the trial court did not abuse its discretion in admitting the extraneous-offense evidence over Sanders's untimely-notice objection.

Sanders next complains that the trial court abused its discretion in denying his motion for continuance (filed on November 24), contending that a continuance was necessary so his trial counsel could review the "voluminous" extraneous-offense material. The motion was premised on the State's alleged untimely notice of intent to introduce extraneous-offense evidence, which created the need for a continuance. We review a denial of a motion for continuance for abuse of discretion. *Duhamel v. State*, 717 S.W.2d 80, 83 (Tex. Crim. App. 1996). We have held above that Sanders did not make a request for such notice; thus, the trial court did not abuse its discretion in denying the motion for continuance.

The trial court ruled that the child pornography extraneous-offense evidence was inadmissible during guilt-innocence but allowed it during punishment. Sanders asserts that admission was error because the trial court should not be allowed to make such a reversal of position. Sanders cites no authority on point, referring generally to

doctrines such as stare decisis, law of the case, and collateral estoppel. But as the State points out, extraneous-offense evidence admitted during punishment serves a different purpose from evidence admitted during guilt-innocence. *Compare* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2005) (character evidence, including prior acts demonstrating that character, admissible at punishment stage) *with* Tex. R. Evid. 404(b) (extraneous acts generally not admissible to show defendant's character). The trial court did not err in allowing the child pornography evidence during punishment. For all the above reasons, we overrule Sanders's second issue.

Expert Testimony

In his third issue, Sanders complains of the trial court's admission of expert testimony from Jessie Lee, the State's forensic computer examiner who recovered the child pornography from computer media found in Sanders's apartment. Sanders asserts that the State failed to show that the testimony was sufficiently reliable. We review the trial court's admission of expert testimony for an abuse of discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

To be reliable, evidence derived from a scientific theory must satisfy three criteria: (a) the underlying scientific theory must be valid; (b) the technique applying the principle must be valid; and (c) the technique must have been properly applied on the particular occasion. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex Crim. App. 1992). Factors affecting the trial court's proper determination of these three criteria include, but are not limited to: (1) the extent to which the underlying scientific theory and

technique are accepted as valid by the relevant scientific community, if such community can be ascertained; (2) the qualifications of any expert testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of any person who applied the technique on the occasion in question. *Id.*

Lee, a certified peace officer and criminal investigator for the district attorney for four years, said that he performs computer forensic analysis daily. He had over 600 hours of training in his field, had attended various training programs in his field, and, at the time of trial, was certified by the International Association of Computer Investigation Specialists. His training included software programs like EnCase and Forensic Toolkit. EnCase is a "field standard" for forensic computer examination; treatises about EnCase have been published.

Lee explained that when he takes a hard drive from a computer, he uses a program like EnCase to automate the task of searching and finding the files on it. An image of the drive is taken; the files are copied, and EnCase validates the copy by an "MD5 hash," a 128-bit algorithm that verifies the image. The MD5 hash is essentially a "digital fingerprint" of a drive, and if the hash values match, Lee said that "basically there's no chance" that an error occurred in making an exact duplicate of the original computer file.

Lee used EnCase on computer files taken from Sanders's computer. EnCase indexed the files, and Sanders was able to retrieve deleted files containing child pornography from Sanders's computer. We find that the trial court did not abuse its discretion in admitting Lee's testimony and the evidence from Sanders's computer in the punishment phase. *See Williford v. State*, 127 S.W.3d 309, 312-13 (Tex. App. – Eastland 2004, pet. ref'd) (finding similar testimony about EnCase reliable in child pornography case).[1] We overrule Sanders's third issue.

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[1] In *Williford*, the court stated:

> We find that Detective Owings's testimony satisfied the *Kelly* criteria for reliability. Detective Owings provided testimony on each of the seven factors identified in *Kelly*. Detective Owings is the computer expert for the Brownwood Police Department and is knowledgeable about EnCase. He testified that EnCase is generally accepted in the computer forensic investigation community, that EnCase is used worldwide, that he knew how to use EnCase, that he knew how EnCase worked, that he had successfully used EnCase in the past, that EnCase can be tested by anyone because it was commercially available and anyone could purchase it, that EnCase has been tested, that there have been several articles written about EnCase and other computer forensic software programs, that SC Magazine gave EnCase an overall five-star rating out of five stars, that EnCase has a low potential rate of error, that he successfully copied appellant's hard drive by using EnCase, and that EnCase verified that he had successfully copied appellant's hard drive. Detective Owings described in detail for the trial court how EnCase worked. Detective Owings's testimony established EnCase's reliability. The trial court did not abuse its discretion. . . .

127 S.W.3d at 312-13; *see also Hernandez v. State*, 116 S.W.3d 26, 28-29 (Tex. Crim. App. 2003 ("once some courts have, through a *Daubert/Kelly* "gatekeeping" hearing, determined the scientific reliability and validity of a specific methodology to implement or test the particular scientific

(Continued on following page)

Search and Seizure

The fourth issue asserts that the trial court erred in denying Sanders's motion to suppress the results (the computer media containing child pornography) of the search of Sanders's apartment. Sanders argues that the affidavit used to obtain the search warrant failed to demonstrate probable cause that the items sought were at the apartment.

We have previously articulated the standard of review of a trial court's denial of a motion to suppress where the warrant allegedly was not supported by probable cause:

> Whether probable cause exists to support the issuance of a search warrant is determined from the "four corners" of the affidavit alone. *Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996). . . . According to *Guzman* [*v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997)], when an appellate court reviews this type of question [mixed questions of law and fact when the resolution of those questions does not turn on an evaluation of credibility and demeanor], it is in as good a position as the trial court to resolve the issue, and therefore determines the issue independently, or de novo. 955 S.W.2d at 89. That is, we apply the same standard that the trial court applied when it evaluated the magistrate's decision to issue the search warrant on the basis of the affidavit. *Burke v. State*, 27 S.W.3d 651, 654 (Tex. App. – Waco 2000, pet. ref'd); *Lane v. State*, 971 S.W.2d 748, 752 (Tex. App. – Dallas 1998, pet. ref'd).

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theory, other courts may take judicial notice of the reliability (or unreliability) of that particular methodology.").

> In determining de novo the issue before the trial court, we do not, however, determine independently, or de novo, if there was probable cause. *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527 (1983). The United States Supreme Court strictly prohibits such after-the-fact, de novo scrutiny. *Id.* Instead, we give great deference to the magistrate's decision to issue the warrant and determine whether, considering the totality of the circumstances, the magistrate had a "substantial basis for concluding probable cause existed." *Id.* at 238-39, 103 S. Ct. at 2332. This deferential standard of review of a magistrate's probable-cause determination promotes the United States Supreme Court's stated policy of preserving the incentive to peace officers to obtain a warrant instead of conducting warrantless searches. *Massachusetts v. Upton*, 466 U.S. 727, 733, 104 S. Ct. 2085, 2088, 80 L. Ed. 2d 721 (1984).

Morris v. State, 62 S.W.3d 817, 821 (Tex. App. – Waco 2001, no pet.).

A request for a warrant must be supported by a sworn affidavit that sets out facts sufficient to support a finding of probable cause. TEX. CODE CRIM. PROC. ANN. art. 18.01(b) (Vernon 2005). Among other requirements, the facts asserted in the affidavit must be sufficient to show "that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place or thing to be searched." *Id.* art. 18.01(c)(3); *Massey*, 933 S.W.2d at 148. The allegations are sufficient if they would justify a conclusion that the items to be searched for are probably on the premises. *Ramos v. State*, 934 S.W.2d 358, 363 (Tex. Crim. App. 1996).

The affiant, Detective Carrol Starkey of the Tarrant County Sheriff's Department, stated in her February 2003 affidavit that she investigates physical and sexual abuse of children and has training in investigating child sexual exploitation. Through her training and experience, she has learned that child sexual abusers collect child pornography, which they usually cherish and keep in a secure place, such as a residence, to avoid detection by law enforcement. Starkey interviewed C., who told her that Sanders had sexually abused her and made her look at child pornography on his computer. Starkey also spoke with C.'s mother, who said that when Sanders moved out in August 2002, he took all the computers but later returned two, keeping at least one that Sanders still had in his apartment.

Sanders asserts that the information supporting the warrant was stale. In determining probable cause, the magistrate is required to rely on information that is not stale. *Morris*, 62 S.W.3d at 823. The proper method to determine whether the facts supporting a search warrant have become stale is to examine, in light of the type of criminal activity involved, the time elapsing between the occurrence of the events set out in the affidavit and the time the search warrant was issued. *Id.* When the affidavit recites facts indicating activity of a protracted and continuous nature, *i.e.*, a course of conduct, the passage of time becomes less significant. *Id.*

C. told Starkey that she was shown child pornography on Sanders's computer in March 2001 and that she had last seen it in September 2001. C.'s mother told Starkey on January 31, 2003 that Sanders still had at least one of the computers that had been in the Sanders residence, and Sanders had taken it when he moved out in August 2002.

Starkey's affidavit contained ample information – including Starkey's statement that child pornography is "usually kept and cherished, and rarely thrown away" – from which the magistrate had a "substantial basis" under the totality of the circumstances for concluding that probable cause existed that the computer and related storage devices were kept in Sanders's apartment and contained child pornography. *See id.* at 823-24; *Burke*, 27 S.W.3d at 655. The magistrate could have reasonably inferred that the information in the affidavit was not stale, and we accord that reasonable inference great deference. *Morris*, 62 S.W.3d at 824 (citing *Ramos*, 934 S.W.2d at 363). We conclude that the facts and circumstances submitted to the magistrate within the "four corners" of Starkey's affidavit provide a "substantial basis" for the magistrate's conclusion that child pornography would probably be found at Sanders's apartment at the time the warrant was issued, and therefore, the affidavit was sufficient to establish probable cause. Sanders's fourth issue is overruled.

Conclusion

Having overruled all of Sanders's issues, we affirm the trial court's judgment.

BILL VANCE

Justice

CASE NO. 0940303R

THE STATE OF TEXAS	§	IN THE CRIMINAL DISTRICT
VS.	§	COURT NUMBER THREE
ROGER LEE SANDERS	§	TARRANT COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

Judge Presiding	: HON. ELIZABETH BERRY	Date of Judgment	: DECEMBER 6, 2004
Attorney for State District Attorney	: TIM CURRY	Assistant District Attorney	: DARRELL DAVILA LORI VARNELL
Attorney for Defendant	: JERRY J. LOFTIN M. TRENT LOFTIN	Charging Instrument	: INDICTMENT

Offense Date	Convicted Offense	
APRIL 1, 2002	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	**Count**	**Plea**
1ST	ONE	NOT GUILTY

Findings on Deadly Weapon : NONE

Offense Date	Convicted Offense	
APRIL 1, 2002	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	**Count**	**Plea**
1ST	TWO	NOT GUILTY

Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
MARCH 15, 2001	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	THREE	NOT GUILTY
Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
MARCH 15, 2001	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	FOUR	NOT GUILTY
Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
DECEMBER 15, 1999	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	FIVE	NOT GUILTY
Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
DECEMBER 15, 1999	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	SIX	NOT GUILTY

Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
NOVEMBER 15, 1999	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	SEVEN	NOT GUILTY
Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
NOVEMBER 15, 1999	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	EIGHT	NOT GUILTY
Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
OCTOBER 15, 1999	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	NINE	NOT GUILTY
Findings on Deadly Weapon : NONE		
Offense Date	Convicted Offense	
OCTOBER 15, 1999	AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER 14 YEARS OF AGE	
Degree	Count	Plea
1ST	TEN	NOT GUILTY

Findings on Deadly Weapon	: NONE
Plea to Enhancement Paragraph(s)	: NONE
Plea to Habitual Paragraph(s)	: NONE
Findings on Enhancement/ Habitual Paragraph(s)	: NONE
Jury Verdict	: GUILTY
Punishment Assessed By	: JURY
Date Sentence Imposed	: DECEMBER 8, 2004 Date to Commence : DECEMBER 8, 2004
Punishment Place of Confinement	: COUNT ONE – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT TWO – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT THREE – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT FOUR – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT FIVE – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Punishment Place of Confinement	: COUNT SIX – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT SEVEN – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT EIGHT – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT NINE – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Punishment Place of Confinement	: COUNT TEN – LIFE : INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Time Credited	: 9 DAYS Court Costs: $283.00
Reparation	: NONE Restitution : NONE
Multiple Sentences	: TO BE SERVED CONCURRENTLY COUNT ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN, EIGHT, NINE AND TEN ARE TO BE SERVED CONCURRENTLY WITH EACH OTHER

On this day, set forth above, this cause came for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in open court, the above-named counsel for Defendant also being present, or, where a Defendant is not represented by counsel, that the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel; and the said Defendant having been duly arraigned and it appearing to the Court that Defendant was mentally competent, and

having pleaded as shown above to the indictment herein, both parties announced ready for trial and thereupon a jury, to-wit, the above named foreman and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into Court by the proper officer, the Defendant and Defendant's counsel being present, and returned into open court the verdict set forth above, which was received by the Court, and is here now entered upon the minutes of the Court as shown above.

Thereupon, the Defendant elected to have punishment assessed by the above shown assessor of punishment, and when shown above that the indictment contains enhancement paragraph(s), which were not waived, and alleges Defendant to have been convicted previously of any felony or offenses for the purpose of enhancement of punishment, then Court asked Defendant if such allegations were true or false and Defendant answered as shown above. And when Defendant is shown above to have elected to have the jury assess punishment, such jury was called back into the box and heard evidence relative to the question of punishment and having been duly charged by the Court, they retired to consider such question, and after having deliberated, they returned into Court the verdict shown under punishment above; and when Defendant is shown above to have elected to have punishment fixed by the Court, in due form of law further evidence was heard by the Court relative to the question of punishment and the Court fixed the punishment of the Defendant as shown above.

IT IS THEREFORE CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, as set forth above, and said Defendant be punished in accordance with the Jury Verdict or the Court's Finding, as shown above and that the Defendant is sentenced to a term of imprisonment or fine or both, as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Institutional Division of the Texas Department of Criminal Justice, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary.

And, if shown above that the Defendant has been duly and legally convicted of a prior offense by showing the court, cause number, and the offense, together with the punishment for such offense and date Defendant was sentenced for such offense in accordance with such conviction, then it is further ORDERED AND ADJUDGED that the punishment herein adjudged against said Defendant shall begin when the judgment in such prior offense, when shown above, shall have ceased to operate.

And the said Defendant is remanded to jail until said Sheriff can obey the direction of this judgment.

/s/ Elizabeth Berry
PRESIDING JUDGE

Date Signed : 12/17/04

Notice of Appeal : DECEMBER 8, 2004

Mandate Received : _____

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

Wednesday, August 30, 2006
Re: Case No. PD-0424-06
COA: 10-05-00030-CR
STYLE: SANDERS, ROGER LEE

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On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

LEIGH W. DAVIS
800 W WEATHERFORD
FORT WORTH TX 76102

C004